



GENERAL SERVICES ADMINISTRATION

48 CFR Parts 515, 538 and 552

[GSAR Case 2019-G503; Docket No. 2022-0019; Sequence No. 1]

RIN 3090-AK09

**General Services Administration Acquisition Regulation (GSAR);
Streamline GSA Commercial Contract Clause Requirements**

AGENCY: Office of Acquisition Policy, General Services Administration.

ACTION: Proposed rule.

SUMMARY: The General Services Administration (GSA) is proposing to amend the General Services Administration Acquisition Regulation (GSAR) to clarify and streamline the clauses contracting officers should reference in GSA acquisitions for commercial products and commercial services. The rulemaking proposes to update several clauses and other related parts by eliminating out of date references and any requirements that are not necessary by law.

DATES: Interested parties should submit written comments to the Regulatory Secretariat as noted below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to GSAR Case 2019-G503 to: *Regulations.gov*: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "GSAR Case 2019-G503". Select the link "Comment Now" that corresponds with GSAR Case 2019-G503. Follow the instructions provided at the "Comment Now" screen. Please include your name, company name (if any), and "GSAR Case 2019-G503" on your attached document. If your comment

cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the FOR FURTHER INFORMATION CONTACT section of this document for alternate instructions.

Instructions: Please submit comments only and cite GSAR Case 2019-G503, in all correspondence related to this case. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Mr. Nicholas Giles, Procurement Analyst, at GSARPolicy@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755 or GSARegsec@gsa.gov. Please cite GSAR Case 2019-G503.

SUPPLEMENTARY INFORMATION:

I. Background

As the largest consumer of commercial products and services, the federal government must ensure its contracting officers include the appropriate safeguards when procuring these products and services. As part of GSA's regulatory review efforts, GSA identified several duplicative and outdated clauses incorporated by reference at GSAR 552.212-71 *Contract Terms and Conditions Applicable to GSA Acquisitions of Commercial Products and Commercial Services*, GSAR 552.212-72 *Contract Terms and Conditions Required To Implement Statutes or Executive Orders Applicable to GSA Acquisition of Commercial Products and Commercial Services*, and other related GSAR sections. This

proposed rule streamlines and reorganizes the references in GSAR Clauses 552.212-71 and 552.212-72, and other related GSAR sections for contracting officers to consider inserting in solicitations and contracts for procuring commercial products and services. As a result, the deletion of some of the references within these clauses will reduce the time contracting officers spend on reviewing for applicability for commercial procurements.

GSA is amending the GSAR to reorganize 552.212-71 and 552.212-72 to reduce duplication of content and to ensure consistency within GSA's guidance as it relates to the acquisition of commercial products and commercial services. In addition, GSA is amending the GSAR to reorganize 515.408 and 538.273 to correct technical errors and clarify clauses.

II. Authority for This Rulemaking

Title 40 of the United States Code (U.S.C.) Section 121 authorizes GSA to issue regulations, including the GSAR, to control the relationship between GSA and contractors.

III. Discussion and Analysis

GSA's review of the GSAR clauses for procuring commercial products and services resulted in the reorganization of GSAR clauses and applicable parts including the removal, transferring and renumbering of referenced clauses within GSAR 552.212-71, 552.212-72 and other applicable GSAR sections to ensure contracting officers include the appropriate provisions and clauses in commercial contracts and solicitations. These changes can be categorized into three areas: 1) reorganization of commercial clauses and applicable parts; 2) relocation of an FSS clause; and 3) editorial changes.

1. Reorganization of commercial clauses and applicable parts

The proposed changes to the GSAR will:

a. Remove references to five (5) obsolete clauses in 552.212-71 that were deleted in previous GSAR cases. Based on GSA's review of GSAR 552.212-71, this rule proposes to remove the references to the following five (5) obsolete clauses:

- (1) 552.228-70 *Workers' Compensation Laws*¹;
- (2) 552.232-71 *Adjusting Payment*²;
- (3) 552.232-73 *Availability of Funds*³;
- (4) 552.232-78 *Payment Information*⁴; and
- (5) 552.246-76 *Warranty of Pesticides*⁵.

b. Remove references to clauses that only apply to procurements under the FSS or Multiple Award Schedule (MAS) program from GSAR 552.212-71 and 552.212-72. Based on GSA's review of GSAR 552.212-71 and 552.212-72, this proposed rule removes the following three (3) clauses that apply exclusively to FSS or MAS contracts and are not appropriate for broad commercial procurements:

- (1) 552.215-72 *Price Adjustment-Failure to Provide Accurate Information*⁶;

¹ See 74 FR 17099, dated May 14, 2009, deleting GSAR clause 552.228-70.

² See 74 FR 54915, dated November 25, 2009, deleting GSAR clause 552.232-71.

³ Ibid., deleting GSAR clause 552.232-73.

⁴ Ibid., deleting GSAR clause 552.232-78.

⁵ See 74 FR 26110, dated June 1, 2009, deleting GSAR clause 552.246-76.

⁶ The prescription for this clause at GSAR 515.408(d) directs contracting officers to insert this clause in solicitations and contracts under the MAS program when the contract contains the basic clause 552.238-80 Industrial Funding Fee and Sales Reporting.

- (2) 552.238-73 *Identification of Electronic Office Equipment Providing Accessibility for the Handicapped*; and
- (3) 552.238-78 *Identification of Products That Have Environmental Attributes*.

Removing references to these three (3) clauses will ensure consistency with GSA's previous amendments to the GSAR to consolidate clauses associated solely with GSA's FSS or MAS contracts into GSAR Part 538.⁷

c. Relocate all references to commercial contract clauses required by law from GSAR clause 552.212-71, which contains clauses required for GSA policy only, and add to GSAR clause 552.212-72, which is focused on statutory requirements. The two (2) clauses whose references are transferred and their respective statutory authorities are as follows:

(1) 552.215-70 *Examination of Records*. This clause is required by Examination of Facilities and Records of Contractor, 41 U.S.C. § 4706; and

(2) 552.232-23 *Assignment of Claims*. This clause is required by the Assignment of Claims Act, 41 U.S.C. § 6305, et. al.

2. Relocation of an FSS clause

The proposed changes to the GSAR will relocate the prescription for GSAR 552.215-72 at paragraph (d) of 515.408 to the new paragraph (d)(36) at 538.273, and for conforming changes, renumber the price adjustment clause at GSAR 552.215-72 to 552.238-117. The relocation of this clause and its prescription

⁷ See 75 FR 5241, dated February 2, 2010, and 84 FR 17030, dated April 23, 2019.

is consistent with GSA's rewrite efforts to move all FSS or MAS clauses into GSAR Part 538.

3. Editorial changes

The proposed change to the GSAR will:

a. Delete GSAR 515.408(a)(1) to remove obsolete reference to GSAR clause 552.212-70 *Preparation of Offer (Multiple Award Schedule)* and renumber accordingly. On February 2, 2010, GSA deleted GSAR 552.212-70⁸ but retained its text in GSA internal policy at I-FSS-972.⁹ The proposed rule will eliminate all references to the obsolete GSAR clause 552.212-70 from GSAR 515.408.

b. Revise GSAR 552.212-71 to change the title of the referenced clause from GSAR 552.232-72 *Final Payment* to GSAR 552.232-72 *Final Payment Under Building Services Contracts*;

c. Correct grammatical errors in paragraphs (d)(2) and (d)(19) of 538.273; and

d. Incorporate minor editorial changes to enhance the readability of the following provision and clause designations and prescriptions:

(1) paragraph (d)(22) of GSAR 538.273;

(2) paragraph (a) of GSAR 552.212-71; and

(3) the introductory text of GSAR 552.212-72.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory

⁸ See 75 FR 5241 deleting GSAR clause 552.212-70 *Preparation of Offer (Multiple Award Schedule)* from GSAR Part 512 and contemplating moving the clause to GSAR Part 538 as a better fit. The final rule for this case did not move the clause, but did delete the clause.

⁹ See Acquisition Letter MV-20-03, dated February 27, 2020, authorizing the continued use of Clause I-FSS-972, *Preparation of Offer (Multiple Award Schedule)*.

alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. OMB anticipates that this will not be a significant regulatory action and, therefore, will not be subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a "major rule" may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The General Services Administration will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the Federal Register. This rule is not anticipated to be a "major rule" under 5 U.S.C. 804(2).

VI. Regulatory Flexibility Act

The General Services Administration does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S. 601, et seq. because the proposed changes to the GSAR do not add any requirement but rather will reorganize

clauses by removing, transferring, re-titling and renumbering referenced clauses and will make technical and editorial changes to ensure contracting officers incorporate the correct clauses when procuring commercial products and commercial services. However, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared consistent with 5 U.S.C. 603.

The Regulatory Secretariat will be submitting a copy of the Initial Regulatory Flexibility Analysis (IRFA) to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. The General Services Administration invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The General Services Administration will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (GSAR Case 2019-G503) in correspondence.

The analysis is summarized as follows:

The General Services Administration is proposing to amend the GSAR at 552.212-71 and 552.212-72 and related parts to clarify and streamline the contract terms and conditions applicable to GSA acquisitions of commercial products and commercial services.

The objective of the rule is to reorganize the appropriate GSAR clauses and parts currently used in commercial solicitations and contracts to reduce duplication and to ensure consistency within GSA's guidance.

The rule ensures that contracting officers consider the appropriate clauses in solicitations and contracts for procurements for commercial products and commercial services. The legal basis for the rule is Title 40 of the United States Code (U.S.C.) Section 121.

The rule applies to large and small businesses, which are awarded contracts for the acquisition of commercial products, including commercial components, and commercial services. Information generated from the System for Award Management (SAM), for Fiscal Years 2020-2021 has been used as the basis for estimating the number of contractors that may involve the procurement of commercial services and commercial products. The analysis focused on contracts for commercial items procured pursuant to the procedures in GSAR Part 512 (Acquisition of Commercial Items) and clause 552.212-4 that was included in the contract.

Examination of this data revealed in fiscal years 2020 and 2021, an average of 23,603 contracts were awarded for commercial products and services. Of these 23,603 new awards, an average of 11,297 (48%) contract awards were to small business entities.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

The General Services Administration does not expect this rule to have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act, at 5 U.S.C. 601. This rule merely reorganizes requirements currently in use in solicitations and contracts involving the acquisition of commercial products and

commercial services, and does not implement new or changed requirements.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives to this rule which would accomplish the stated objectives. This rule does not initiate or impose any new administrative or performance requirements on small business contractors because the policies are already being followed.

VII. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the GSAR do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 515, 538 and 552

Government procurement.

Jeffrey A. Koses,

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Office of Acquisition Policy,

Office of Government-wide Policy,

General Services Administration.

Therefore, GSA proposes to amend 48 CFR parts 515, 538 and 552 as set forth below:

1. The authority citation for 48 CFR parts 515, 538 and 552 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c).

PART 515 - CONTRACTING BY NEGOTIATION

515.408 [Amended]

2. Amend section 515.408 by-

- a. Removing paragraph (a)(1);
- b. Redesignating paragraphs (a)(2), (a)(3) and (a)(4) as paragraphs (a)(1), (a)(2) and (a)(3);
- c. Removing from the introductory text of paragraph (b), "Please refer to Clause 552.212-70, Preparation of Offer (Multiple Award Schedule), for additional information concerning your offer.";
- d. Removing from paragraph (b)(3) the phrase, "(See definition of "concession" and "discount" in 552.212-70.)";
- e. Removing from paragraph (c) the first sentence in Column 2;
- f. Removing paragraph (d); and
- g. Redesignating paragraph (e) as paragraph (d).

PART 538 - FEDERAL SUPPLY SCHEDULE CONTRACTING

3. Amend section 538.273 by-

- a. Revising the introductory text of paragraph (d)(22);
- and
- b. Adding paragraph (d)(37).

The revision and addition read as follows:

538.273 FSS solicitation provisions and contract clauses.

* * * * *

(d) * * *

(22) 552.238-98, Clauses for Overseas Coverage. Use only in FSS solicitations and contracts when overseas acquisition is contemplated. The GSAR clauses and GSAR provisions in paragraphs (d) (22) (i) through (xi) of this section shall also be inserted in full text, when applicable.

* * * * *

(37) 552.238-117, Price Adjustment-Failure to Provide Accurate Information. Use only in FSS solicitations and contracts under the MAS program. This clause is used when the contract contains the basic clause 552.238-80 Industrial Funding Fee and Sales Reporting.

* * * * *

PART 552-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Revise section 552.212-71 to read as follows:

552.212-71 Contract Terms and Conditions Applicable to GSA Acquisition of Commercial Products and Commercial Services.

As prescribed in 512.301(a) (1), insert the following clause:

CONTRACT TERMS AND CONDITIONS APPLICABLE TO GSA ACQUISITIONS OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES (JAN, 2022)

(a) The Contractor agrees to comply with any clause that is incorporated herein by reference to implement agency policy applicable to acquisition of commercial products, including commercial components, and commercial services. The clause in effect based on the applicable regulation cited on the date the solicitation is issued applies unless otherwise stated herein. The Contracting Officer should check the clauses in paragraph (b) that apply or delete the clauses that do not apply from the list.

The Contracting Officer may add the date of the clause if desired for clarity. The GSAR clauses in paragraph (b) of this section are incorporated by reference.

(b) Clauses.

552.203-71	Restriction on Advertising
552.211-73	Marking
552.219-70	Allocation of Orders—Partially Set-Aside Items
552.229-70	Federal, State, and Local Taxes
552.232-72	Final Payment Under Building Services Contracts
552.237-71	Qualifications of Employees
552.242-70	Status Report of Orders and Shipments

5. Revise section 552.212-72 to read as follows:

552.212-72 Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to GSA Acquisition of Commercial Products and Commercial Services.

As prescribed in 512.301(a)(2), insert the following clause:

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS APPLICABLE TO GSA ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES (JAN 2022)

The Contractor agrees to comply with any provision or clause that is incorporated herein by reference to implement provisions of law or Executive Orders applicable to acquisition of commercial items or components. The provision or clause in effect based on the applicable regulation cited on the date the solicitation is issued applies unless otherwise stated herein. The contracting

officer should either check the provisions and clauses that apply or delete the provisions and clauses that do not apply from the lists in paragraphs (a) and (b). The contracting officer may add the date of the provision or clause if desired for clarity. The GSAR provisions in paragraph (a) and GSAR clauses in paragraph (b) are incorporated by reference.

(a) Provisions.

(b) Clauses.

552.215-70 Examination of Records by GSA

552.223-70 Hazardous Substances

552.223-71 Nonconforming Hazardous Material

552.223-73 Preservation, Packaging, Packing,
Marking, and Labeling of Hazardous Materials (HAZMAT) for
Shipments.

552.232-23 Assignment of Claims

(End of clause)

552.215-72 [Removed and Reserved]

6. Remove and reserve section 552.215-72.

7. Add section 552.238-117 to read as follows:

**552.238-117 Price Adjustment—Failure to Provide Accurate
Information.**

As prescribed in 538.273(d)(36), insert the following clause:

PRICE ADJUSTMENT—FAILURE TO PROVIDE ACCURATE INFORMATION (AUG 1997)

(a) The Government, at its election, may reduce the price of this contract or contract modification if the Contracting Officer determines after award of this contract or contract modification that the price negotiated was increased by a significant amount because the Contractor failed to:

(1) Provide information required by this solicitation/contract or otherwise requested by the Government; or

(2) Submit information that was current, accurate, and complete; or

(3) Disclose changes in the Contractor's commercial pricelist(s), discounts or discounting policies which occurred after the original submission and prior to the completion of negotiations.

(b) The Government will consider information submitted to be current, accurate and complete if the data is current, accurate and complete as of 14 calendar days prior to the date it is submitted.

(c) If any reduction in the contract price under this clause reduces the price for items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States—

(1) The amount of the overpayment; and

(2) Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective each quarter prescribed by the Secretary of Treasury under 26 U.S.C.6621(a)(2).

(d) Failure to agree on the amount of the decrease shall be resolved as a dispute.

(e) In addition to the remedy in paragraph (a) of this clause, the Government may terminate this contract for default. The rights and remedies of the Government specified herein are

not exclusive, and are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

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